United States Court of Appeals
for the First Circuit

No. 12-1233

KG URBAN ENTERPRISES, LLC,
PLAINTIFF-APPELLANT,

v.

DEVAL L. PATRICK, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS, AND THE CHAIRMAN AND COMMISSIONERS OF THE MASSACHUSETTS GAMING COMMISSION, IN THEIR OFFICIAL CAPACITIES,
DEFENDANTS-APPELLEES,

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Appellees' Brief.

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Issues Presented.

The Massachusetts Legislature authorized limited casino gaming in Mass. St. 2011, c. 194 (the "Act"). KG Urban Enterprises claims that several provisions are unconstitutional on their face. KG challenged three sections that: authorize negotiation of a compact with a federally-recognized Indian tribe to govern casino gaming on Indian lands, which could lead to the tribe being able to open such a casino under federal law without any state license; provide initial funding to implement the Act; and establish an advisory committee. The district court denied a preliminary injunction and dismissed the case.

1. Was KG's equal protection claim properly dismissed where:

(a) there is no live controversy because the claim regarding the tribal compacting provisions is not ripe, KG waived its claim to the funding provision by not pressing it on appeal, and KG lacks standing to challenge the makeup of an advisory body with no regulatory power;

(b)(1) no equal protection issue is raised by regulating casino licensing differently in some counties than in others, or by authorizing a compact with a federally-recognized Indian tribe but not with KG;

(b)(2) to the extent the Act treats gaming by Indian tribes on Indian lands differently than other gaming, those provisions are subject to rational basis review because they make a political distinction, not a racial classification, and because they were authorized by Congress; and

(b)(3) KG does not claim that the challenged provisions have no conceivable rational relationship to legitimate governmental goals?

2. Can KG argue for the first time on appeal that the Massachusetts Constitution bars treatment of Indian tribes that the federal Equal Protection Clause permits? If so, is this state law claim

barred by the Commonwealth's sovereign immunity and the Eleventh Amendment? Alternatively, is it wrong as a matter of state law?

3. KG has dropped its claim that the Act violates the federal Indian Gaming Regulatory Act. May KG nonetheless win declaratory relief under this claim? If so, may it obtain a declaration that is barred by the Supreme Court's holding that state officials may not be sued to enforce IGRA, that would misstate the scope of IGRA, and that is aimed at Indian tribes that are not parties to the case?

4. Does the rule that Massachusetts statutory provisions are severable bar any injunction against provisions that are constitutional?

Statement of the Case.

(1) The Act Authorizing Limited Casino Gaming Becomes Law.

The Act establishes a new Massachusetts Gaming Commission and authorizes it to license several casinos.[1] Governor Patrick signed the Act into law on November 22, 2011.[2] Before that date it was a crime to operate a gaming establishment in Massachusetts.[3] The Act exempts licensed casinos from this prohibition.[4]

Section 91 of the Act also empowers the Governor to negotiate a compact with a federally-recognized Indian tribe to govern casino gambling on Indian lands that may be acquired in Massachusetts, subject to approval by the Legislature, as authorized by Congress in the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*,

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[1] *See* Mass. Gen. L. c. 23K, §§ 3, 19, 20 (added by Mass. St. 2011, c. 194, § 16).

[2] JA.12-14 (complaint).

[3] *See* Mass. Gen. L. c. 271, §§ 3, 5, 7, 8 (2010 Official Ed.).

[4] *See id.* as amended by Mass. St. 2011, c. 194, §§ 53, 54, 57, 58.

("IGRA").[5] If a tribe enters into a compact with the Commonwealth, the compact is approved by the United States Secretary of the Interior, and the tribe meets the other requirements of IGRA, then under federal law the tribe could operate a casino on Indian lands without any license from the Commonwealth.[6]

KG's assertion that the Act sets aside a state casino license for an Indian tribe is incorrect and misstates Massachusetts law.[7] The only way for any entity to obtain a state gaming license is through the application process to be administered by the Gaming Commission.[8]

(2) KG's Claims.

KG filed suit challenging parts of the Act a few hours after it became law.[9] KG sued Governor Patrick and the future members of the Gaming Commission solely in their official capacities.[10] The five Commissioners were sworn in and first met on April 10, 2012.

KG claimed that three provisions of the Act are unconstitutional on their face: (1) § 91, which in ¶¶ (a)-(d) authorizes negotiation of a Tribal-State compact and in ¶ (e) contemplates that if such a compact is finalized by July 31, 2012, and if the tribe is on track to have land taken into trust by the United States, then the Commission will not issue any state license for a casino in southeastern Massachusetts; (2) the appropriation in § 2A, item 0411-1004, of $5 million for initial costs of

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5 Mass. St. 2011, c. 194, § 91.

6 *See* 25 U.S.C. § 2710(d).

7 KG's Br. 1-2, 6, 8, 10, 13, 23, 28, 40, 45; *but see id.* 12 (conceding that § 91 "would not result in the award of any commercial license").

8 *See* Mass. Gen. L. c. 23K, §§ 19 & 20.

9 KG's Br. 2.

10 JA.11-12, ¶¶ 5-6 (complaint)

implementing the Act, including costs incurred by the Governor to negotiate a Tribal-State compact as well as start-up costs of the new Commission; and (3) a clause in § 68(a) stating that one of the fourteen members of a new Gaming Policy Advisory Committee "shall be a representative of a federally recognized Indian tribe in the commonwealth."[11] This committee's only role is to make recommendations about gaming policy that are "advisory and shall not be binding on the commission."[12]

Although KG did not challenge any other part of the 104-page statute, it sought a preliminary injunction barring implementation of the entire Act.[13] In the alternative, KG asked the district court to enjoin the three sections challenged by KG.[14]

KG alleged that §§ 2A, 68(a), and 91 of the Act violate the Equal Protection Clause of the Fourteenth Amendment and the equal protection requirements of Article 1 of the Massachusetts Declaration of Rights, which is the first part of the Massachusetts Constitution.[15] It linked these two claims by alleging that "[t]he 'standard for equal protection analysis' under the Declaration of Rights 'is the same as under the Federal Constitution.'"[16]

KG also claimed that § 91, regarding negotiation of a Tribal-State compact, violates and is therefore preempted by IGRA.[17]

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[11] JA.24-28 (complaint).

[12] Mass. St. 2011, c. 194, § 68(a).

[13] JA.28; KG's Motion for Preliminary Injunction (doc. 2) at 1.

[14] KG's P.I. Memorandum (doc. 9) at 44-45.

[15] JA.24-26 (complaint).

[16] JA.26 (quoting *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 243, 850 N.E.2d 533, 545 (2006)).

[17] JA.26-28.

(3) The District Court Dismissed All Claims.

The district court (Gorton, J.) found that KG's claims all fail as a matter of law, denied the motion for a preliminary injunction, and dismissed the case.[18] KG conceded at oral argument that, because it claimed only that the challenged provisions are unconstitutional on their face, no further proceedings would be needed to resolve the case.[19]

The district court held that KG lacks standing to challenge § 68(a) of the Act, which concerns the membership of an advisory committee that will have no regulatory power.[20]

The court also held that KG's equal protection challenge to § 91 and § 2A, item 0411-1004, fails as a matter of law. It noted that "the Ninth and Fourth Circuits have rejected equal protection challenges" to similar California and North Carolina laws that authorize Tribal-State compacts to govern gaming on Indian lands but bar casinos elsewhere,[21] observed that "both Circuit Courts applied the rational basis test" to review those state laws, and held that the Supreme Court's decisions "in *Mancari* and *Yakima* compel the same result in this case."[22]

The court held that rational basis review applies here for two reasons. First, *Morton v. Mancari*, 417 U.S. 535 (1974), holds that a law that treats federally-recognized Indian tribes differently than other

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[18] KG Add.36a-38a (district court order).

[19] *Cf.* KG Add.37a (dismissal appropriate "because plaintiff brings only a facial … challenge to the Gaming Act and no further briefing or proceedings would affect this Court's constitutional analysis").

[20] KG Add.13a.

[21] *See Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004), and *United States v. Garrett*, 122 Fed.Appx. 628 (4th Cir. 2005).

[22] KG Add.30a.

entities makes a classification that "is political rather than racial in nature."[23] The court concluded that "*Mancari* is binding precedent" and that the Supreme Court's holding "that tribal classifications are not racial proxies … remains good law" and governs here.[24]

Second, *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), holds that a state law addressing Indian tribes and Indian territory under authority delegated by Congress is subject to rational basis review.[25] The district court held that this rule applies here because "[n]either party disputes that, by enacting IGRA, Congress delegated a portion of its authority to regulate Indian gaming to the states" or "that the Massachusetts Legislature adopted sections [2A] and 91 of the Gaming Act pursuant to that delegated authority."[26] It rejected KG's assertion that *Yakima Indian Nation* only applies where a federal law mandates that States treat Indian tribes in particular ways, because KG's position was inconsistent with "*Yakima* itself;" in that case the Supreme Court rejected an equal protection challenge to a state statute assuming certain criminal and civil jurisdiction over Indian territory because it was passed pursuant to a federal law that "permitted but, importantly, did not require" States to do so.[27] *See Yakima Indian Nation*, 439 U.S. at 495-502.

The court held that § 91 and § 2A of the Act satisfy rational basis review because they "are rationally related to" the Commonwealth's interests "in 1) promoting cooperative relationships with the Indian

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[23] KG Add.25a-26a (quoting *Mancari*, 417 U.S. at 554 n.24).
[24] KG Add.34a-36a.
[25] KG Add.29a-30a, 32a-34a.
[26] KG Add.30a-31a.
[27] KG Add.32a-34a.

tribes residing within its borders, 2) fostering tribal sovereignty, economic development and self-sufficiency and 3) regulating vice activities in compliance with a federal scheme which fulfills Congress's unique obligation towards Indian tribes."[28]

The court accepted KG's position that the equal protection provisions of the Massachusetts Declaration of Rights and the Equal Protection Clause of the Fourteenth Amendment "are coextensive," and therefore treated KG's claim under the Massachusetts Constitution as not adding anything to its claim under the United States Constitution.[29]

Finally, the court rejected KG's claim that the Act violates and thus is preempted by IGRA. It held that "§ 91 of the Gaming Act advances the congressional directive that tribes and states negotiate compacts to govern gaming on tribal lands," that "nothing in § 91 prevents simultaneous compliance with IGRA," and that § 91 "neither conflicts with nor frustrates the purpose of IGRA."[30]

Legal and Factual Background.

(1) KG's Casino Gamble and the Massachusetts Gaming Act.

KG made a bet years ago that the Commonwealth might someday legalize casino gambling.[31] All casinos were illegal in Massachusetts before November 2011.[32] KG nonetheless bought an option on a New Bedford site in February 2007 and made plans to develop it as a casino, on the chance that KG might someday get a license to do so.[33]

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[28] KG Add.31a.
[29] KG Add.24a.
[30] KG Add.17a, 18a, 24a.
[31] JA.21-22, ¶¶ 44-48 (complaint).
[32] JA.12, ¶ 9 (complaint).
[33] JA.21-23, ¶¶ 44-49 (complaint); JA.32-34, ¶¶ 8-20 (Stern Decl.).

The Act establishes a new Gaming Commission and authorizes it to issue one license to operate a gaming establishment with as many as 1,250 slot machines and no table games (a "category 2" license) and to issue up to three licenses to operate casinos with both slot machines and table games ("category 1" licenses).[34] Each category 1 license must be in a different region of the state.[35] KG's site in New Bedford is in Region C, which consists of Bristol, Plymouth, Nantucket, Dukes, and Barnstable counties.[36] Region B consists of Hampshire, Hampden, Franklin, and Berkshire counties in western Massachusetts. Region A consists of Suffolk, Middlesex, Essex, Norfolk, and Worcester counties in central and northeastern Massachusetts. [37]

The Commission has "full discretion as to whether to issue a license."[38] It need not award a license if it "is not convinced that there is an applicant that has both met the eligibility criteria and provided convincing evidence that the applicant will provide value" to the region (for category 1 licenses) or the Commonwealth (for category 2 license).[39]

(2) The Statutory Provisions Regarding a Possible Tribal-State Compact Were Adopted In Accord with the Federal Indian Gaming Regulatory Act.

The Legislature crafted the Act to work in harmony with IGRA, which allows federally-recognized Indian tribes to open casinos with slot machines and table games (which IGRA calls "class III gaming") on

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[34] *See* Mass. Gen. L. c. 23K, §§ 3, 19, 20.
[35] Mass. Gen. L. c. 23K, § 19(a).
[36] *Id.*; JA.15, ¶ 18; JA.23, ¶¶ 52-53 (complaint).
[37] Mass. Gen. L. c. 23K, § 19(a).
[38] Mass. Gen. L. c. 23K, § 17(g).
[39] Mass. Gen. L. c. 23K, §§ 19(a) & 20(a).

Indian lands in any State that permits such gaming.[40] "Indian lands" include lands in a reservation as well as lands in trust by the United States for benefit of a tribe "and over which an Indian tribe exercises governmental power."[41] Congress passed IGRA in part to "promot[e] tribal economic development, self-sufficiency, and strong tribal government," and to provide "a means of generating tribal revenue."[42]

IGRA provides that a tribe wishing to conduct class III gaming on Indian lands must ask the State to negotiate a Tribal-State compact governing such activities, and directs the State to negotiate "in good faith to enter into such a compact."[43] The compact may address, among other things, "the allocation of criminal and civil jurisdiction between the State and the Indian tribe" on Indian lands where the tribe wishes to conduct class III gaming, and the application of State and tribal law to regulate such gaming activity.[44] The tribe may engage in class III gaming if the compact is approved by the Secretary of the Interior and such gaming is authorized by the tribe in an ordinance or resolution that is approved by the National Indian Gaming Commission.[45]

There are two federally-recognized tribes in Massachusetts.[46] The Mashpee Wampanoag Indian Tribal Council wants to open a casino in the southeastern part of the state.[47] The Wampanoag Tribal Council of Gay Head (Aquinnah) may have a similar aim, to the extent it may do

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40 *See* 25 U.S.C. § 2710(d)(1).
41 25 U.S.C. § 2703(4).
42 25 U.S.C. § 2702(1) & (3).
43 25 U.S.C. § 2710 (d)(3)(A).
44 25 U.S.C. § 2710(d)(3)(C)(i) & (ii).
45 25 U.S.C. § 2710(d)(1)(A) & (d)(3)(B); JA.19-20, ¶¶ 37-38.
46 JA.15, ¶ 20 (complaint).
47 JA.15, ¶ 20 (complaint).

so consistent with the settlement of its claim to lands on Martha's Vineyard in an agreement that was signed in 1983[48] and approved by Congress in 1987[49] (*see* page 38 & fn.103, below).

The Legislature was aware that a federally-recognized tribe may be able to open a casino on Indian lands even if the Commonwealth refused to negotiate a compact.[50] In 1996 the Supreme Court held that a suit to enforce the States' IGRA duty to negotiate a compact could only be brought against States that consent to be sued and may not be brought against any State official.[51] However, the Secretary of the Interior responded by adopting regulations under which a tribe may seek federal approval of class III gaming on Indian lands, in a State that permits such gaming, even if the tribe and State do not enter into a compact and the State asserts its immunity from suit to enforce IGRA.[52]

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[48] *See* 25 U.S.C. § 1771f(10).

[49] *See* 25 U.S.C. §§ 1771-1771*i* (Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987).

[50] *See Mulhern v. MacLeod*, 441 Mass. 754, 760, 808 N.E.2d 778, 782 (2004) (Legislature presumed to be aware of federal law).

[51] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[52] *See* 25 C.F.R. §§ 291.1 *et seq.*. There is a split of authority as to whether these regulations are valid. *Compare Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994) (holding that Secretary may promulgate such regulations), *aff'd on other grounds*, 517 U.S. 44, 76 n.18 (1996) (stating that Court expressed no opinion on whether Secretary may provide such a remedy), and *Santee Sioux Nation v. Norton*, 2006 WL 2792734, *6 (D.Neb. 2006) (upholding 25 C.F.R. § 291.1 *et seq.*), *with Texas v. United States*, 497 F.3d 491 (5th Cir. 2007) (holding 2-1 that Secretary lacked authority to promulgate these rules); *but see id.* at 513-526 (Dennis, J., dissenting) (concluding that Secretary had authority under IGRA to promulgate these rules).

KG notes that the Mashpee Wampanoag Tribe currently has no Indian lands in Massachusetts.[53] But the Secretary of the Interior may approve a Tribal-State compact for gaming on land that has not yet been taken into trust by the United States, subject to the conditions that the casino may only be opened if (1) the lands are subsequently "acquired in trust by the Secretary for the tribe," and (2) the Secretary determines that gaming on those lands is in the best interest of the tribe and not detrimental to the surrounding community, and the Governor of the State concurs, under 25 U.S.C. § 2719(b)(1)(A).[54]

In sum, the Legislature knew that if the tribe could obtain land and convince the United States to take it into trust, then the tribe may be able to obtain federal approval to engage in class III gaming even if the Commonwealth refused to negotiate a compact. This could leave the Commonwealth unable to regulate gaming on any Indian lands.

To address this possibility, and consistent with IGRA, the Legislature authorized the Governor—with help from the Commission if he wants it—to negotiate "a compact with a federally recognized tribe in the commonwealth" that "has purchased, or entered into an agreement to purchase, a parcel of land" to be used as a casino and has "scheduled a vote in the host communities for approval" of the casino.[55] Any such compact must be approved by the Legislature[56] and then by the

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[53] JA.15, ¶¶ 20, 22 (complaint); KG's Br. 6-7.

[54] *See* Bureau of Indian Affairs, Notice of Tribal-State Class III Gaming Compact taking effect, 76 FR 11258 (March 1, 2011) ("Warm Springs Compact Notice") (approving compact between Confederated Tribes of Warm Springs Reservation of Oregon and State of Oregon).

[55] Mass. St. 2011, c. 194, § 91(a)-(c).

[56] *Id.*, § 91(d).

Secretary of the Interior.[57] IGRA provides that the Secretary must approve or disapprove a compact within 45 days after its submission; the compact is deemed approved if the Secretary takes no action.[58]

If a tribe enters into a compact with the Commonwealth, then the tribe will be able to open a casino if it also obtains federal approval and meets the other requirements of IGRA; no state license would be necessary, as a matter of federal law.[59]

Recognizing that any tribal casino is likely to be in the southeastern part of the state, the Legislature provided that if no compact has been approved by the Legislature by July 31, 2012, then the Commission shall issue a request for applications for a category 1 license in Region C by October 31, 2012.[60] If a compact is negotiated but "the commission determines that the tribe will not have land taken into trust by the United States Secretary of the Interior," the Commission shall then request such applications.[61] Under Massachusetts law, the October 31 deadline is "directory and not mandatory" because it "does not go to the essence of the thing to be done" and the Legislature has not established any consequences in the event that the Commission is unable to meet the deadline.[62] Such a statutory deadline is "a regulation

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[57] 25 U.S.C. § 2710(d)(8).

[58] 25 U.S.C. § 2710(d)(8)(C).

[59] *See* 25 U.S.C. § 2710(d).

[60] Mass. St. 2011, c. 194, § 91(e).

[61] *Id.*

[62] *See Cullen v. Building Inspector of North Attleborough*, 353 Mass. 671, 679-680, 234 N.E.2d 727, 732 (1968).

for the orderly and convenient conduct of public business and not a condition precedent to the validity of the act done."[63]

In contrast, the Legislature did not establish any deadline for the Commission to solicit applications for category 1 licenses in Regions A or B. Nor is the Commission required to solicit or consider applications for all regions at the same time. The Commission could decide to accept, review, or decide applications from only one region at a time.[64]

(3) Section 91 Is Not Delaying the Consideration or Issuance of Any Gaming License.

It is undisputed that the Commission is not yet accepting any license applications, that it "will almost certainly" not do so before October 2012, and that it is quite possible that the Commission will not be able to begin soliciting applications until sometime in 2013.[65] Thus § 91 of the Act has not prevented KG from applying for a category 1 license in Region C. Nor has it given potential applicants in Regions A or B any head start in the application process. The Chairman of the Gaming Commission explained why in an uncontested affidavit.

The Commissioners—who were sworn in on April 10, 2012—"may not request or consider any license applications until after the Commission promulgates regulations that specify the criteria the Commission will use to evaluate applications, the form of license applications, and the information that applicants must provide to the

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[63] *Id.* (quoting *Cheney v. Coughlin*, 201 Mass. 204, 211, 87 N.E. 744, 747 (1909)).

[64] *See* Mass. Gen. L. c. 23K, §§ 17(g), 19.

[65] JA.43, ¶ 43 (Crosby Aff.).

Commission, among other things."[66] And the Commission will need to hire key staff members before it can promulgate such rules.[67]

Once it has initial rules in place, the Commission must issue a request for applications for the category 2 license before it even begins the process of seeking category 1 applications.[68]

It will take even longer for the Commission to issue any license. The Commission must hire staff for its investigations and enforcement bureau.[69] It may not consider any license application until after the bureau investigates the suitability of the applicant; of any partner, officer, director, manager, affiliate, or close associate of the applicant; and of anyone with a financial interest in the proposed gaming establishment.[70] The Commission must then review the application, decide whether to request independent evaluations, conduct a public hearing, and issue a detailed statement of findings regarding each application.[71] It will take the Commission at least six to nine months after it receives applications to decide whether to issue a gaming license for any particular project.[72]

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66 JA.44, ¶ 4 (Crosby Aff.); *accord* Mass. Gen. L. c. 23K, § 5(a)(1)-(4).
67 JA.44, ¶ 4 (Crosby Aff.).
68 Mass. Gen. L. c. 23K, § 8(a).
69 Mass. Gen. L. c. 23K, § 6.
70 Mass. Gen. L. c. 23K, §§ 12 & 14.
71 Mass. Gen. L. c. 23K, §§ 12(c), 17, 18.
72 JA.44, ¶ 7 (Crosby Aff.).

Summary of Argument.

I.A. The court may dispose of KG's claim under the Equal Protection Clause of the Fourteenth Amendment without reaching the merits. *See* pages 18-23, below. The challenge to § 91 of the Act is not ripe because it may turn out that the Commonwealth does not enter into any Tribal-State compact. Pages 18-21. KG makes no argument that the funding provided in § 2A violates equal protection; it therefore waived that claim. Pages 21-23. And the district court correctly held that KG has no standing to challenge the composition of a new advisory committee with no regulatory power, in § 68(a). Page 23.

I.B. If the court reaches the merits, it should affirm the dismissal of KG's federal equal protection claim. Section 91 satisfies equal protection, just like the similar California and North Carolina statutes that were upheld by the United States Courts of Appeals for the Ninth and Fourth Circuits in *Artichoke Joe's* and *Garrett*. Pages 24-40.

I.B.1. Some of KG's arguments have nothing to do with the Equal Protection Clause. Even if the Act treats some Massachusetts counties differently than others, that would not implicate equal protection or distinguish this case from the Ninth and Fourth Circuits' decisions. Page 25. The authorization to negotiate a Tribal-State compact, in §§ 91(a)-(d), is not subject to an equal protection challenge because KG and federally-recognized Indian tribes are not similarly situated. KG's claim really focuses on § 91(e), which directs the Commission to consider license applications for Region C if no tribal compact has been negotiated or can be implemented, and suggests that the Commission should not consider such applications if a compact is finalized by

July 31, 2012, and the tribe is on track to have land taken into trust by the United States. Pages 25-27.

I.B.2. The challenged provisions are subject to rational basis review even though they may lead to gaming in Region C being limited to a tribal casino on Indian lands. Pages 28-37. The Supreme Court held in *Mancari* and *Antelope* that, because tribes are sovereign political entities, laws that treat tribes differently than others make a political distinction, not a racial classification. Pages 28-32. Furthermore, the Act's tribal compact provisions were adopted under authority delegated by Congress in IGRA. The Court held in *Yakima Indian Nation* that state laws adopted pursuant to delegated congressional authority to regulate Indian tribes are subject to rational basis review. Pages 32-37.

I.B.3. KG does not claim that the Act lacks a rational basis. It therefore concedes that the challenged provisions have a rational relationship to the Commonwealth's interest in regulating gaming and to the interest Massachusetts shares with the Federal government in fostering cooperative relationships with Indian tribes and fostering tribal self-sufficiency and economic development. Pages 37-40.

II. KG's claim under the Massachusetts Constitution fares no better. KG cannot argue for the first time on appeal that the Massachusetts Declaration of Rights imposes more stringent equal protection requirements than does United States Constitution. Pages 40-41. In addition, claims in federal court against Massachusetts officials to enforce state law are barred by the Commonwealth's sovereign immunity, as the Supreme Court held in *Pennhurst*. Pages 41-42. In any case, the Massachusetts Supreme Judicial Court's

decision in *Finch* concerned insurance eligibility rules for aliens; it has no application to tribal gaming on Indian lands. Pages 42-45.

III. KG does not argue that the Act conflicts with, would frustrate the purpose of, or is otherwise preempted by IGRA. It therefore waived that claim. Pages 45-47. KG may not obtain declaratory relief under a claim it has waived. Nor may KG obtain declaratory relief that is barred by the Supreme Court's holding in *Seminole Tribe* that Congress precluded any *Ex Parte Young* action against state officials to enforce IGRA, that would misstate the scope of IGRA, and that is aimed at Indian tribes that are not parties to this action. Pages 47-48.

IV. Under Massachusetts law, the challenged provisions would be severable if KG had demonstrated a constitutional violation, which it has not. If KG's challenge to § 91 were ripe and it were unconstitutional for the Legislature to indicate that the Commission should not accept casino license applications for Region C in the event that a Tribal-State compact is approved by July 31, 2012, the only part of the Act that could be enjoined would be § 91(e). If KG had standing to challenge § 68(a) and it were unconstitutional to reserve one seat on the Gaming Policy Advisory Committee for a representative of a federally-recognized Indian tribe, the only provision that could be enjoined would be that particular requirement. But those provisions would be severable from the rest of the Act. Under no circumstances would KG be entitled to an injunction barring the negotiation of a Tribal-State compact as authorized in §§ 91(a)-(d) and in IGRA, the spending of monies appropriated in § 2A, the formation or meeting of an advisory committee under § 68(a), or any other part of the Act. Pages 48-50.

Argument.

I. THE FEDERAL EQUAL PROTECTION CLAIM WAS PROPERLY DISMISSED.

A. There Is No Live Controversy.

In conducting its de novo review, the Court "may affirm the order of dismissal on any ground fairly presented by the record." *Gabriel v. Preble*, 396 F.3d 10, 13 (1st Cir. 2005). Although the district court reached the merits of KG's challenges to §§ 91 and 2A of the Act, this court can and should affirm dismissal on the ground that the former claim is not ripe and that KG has waived the latter. The district court correctly held that KG lacks standing to challenge § 68(a).

1. The Equal Protection Challenge to the Tribal Compact Provisions in § 91 Is Not Ripe.

KG's equal protection challenge to § 91 of the Act is not ripe. Section 91 has not had and may never have any impact on when the Commission considers applications for Region C casino licenses, or on whether the Commission first considers applications for Regions A or B. The Commission has not begun accepting license applications for any part of the state: the reasons why are unrelated to § 91. It is undisputed that the Commission will probably not be able to solicit any applications before 2013, and that it almost certainly not do so before October 2012, because it will take substantial time to hire staff and to establish the criteria the Commission will use to evaluate applications and to specify the form of license applications and the information that applicants must provide.[73] The October 31 deadline in § 91(e) to solicit applications in Region C—if no Tribal-State compact gets approved by July 31—is

[73] JA.43-45 (Crosby Aff.).

"directory and not mandatory." *See Cullen*, 353 Mass. at 679-680, 234 N.E.2d at 732.

"[A] 'claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *City of Fall River v. Federal Energy Regulatory Comm'n*, 507 F.3d 1, 6 (1st Cir.2007) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). This is not a case in which a plaintiff seeks to challenge future operation of a statute that "is inevitable (or nearly so)." *Riva v. Commonwealth of Mass.*, 61 F.3d 1003, 1010 (1st Cir. 1995). The district court lacked Article III jurisdiction to consider an unripe claim. *E.g., Gilday v. Dubois*, 124 F.3d 277, 295 (1st Cir. 1997), *cert. denied*, 524 U.S. 918 (1998).

The possibility that § 91 may affect the Commission's consideration of Region C license applications is entirely conjectural. Although the Governor has begun efforts to negotiate a Tribal-State compact with the Mashpee Wampanoag Tribe, those negotiations may not be successful and may not lead to any compact being approved by the Legislature by July 31, 2012. If not, then at some point KG will have the opportunity to compete before the Commission for a category 1 license in Region C. *See* Mass. St. 2011, c. 194, § 91(e).

KG misstates the issue, and misconstrues Massachusetts law, when it asserts that § 91 gives Indian tribes an advantage in applying for a state-issued gaming license.[74] The only way that any entity may obtain a state gaming license is through the competitive application process to be administered by the Gaming Commission. *See* Mass. Gen. L. c. 23K, §§ 19 & 20. The criminal prohibition on opening a casino

[74] KG's Br. 1.

without such a license "applies to tribal and non-tribal entities alike."[75] *See* Mass. Gen. L. c. 271, §§ 3, 5, 7, 8. Although § 91 "establishes the procedures by which IGRA-authorized compact may take place under Massachusetts law,"[76] it does not "set aside" any state-issued gaming license "for a federally recognized Indian tribe."[77] A tribe authorized under IGRA to open a casino on Indian lands will not need any state-issued license to do so. *See* 25 U.S.C. § 2710(d).

The allegation that § 91 discourages gaming operators from partnering with KG before July 31, 2012, would not make this claim ripe even if it were supported by something more than the ipse dixit of KG's managing director.[78] Any reticence by private gaming operators to deal with KG would not be State action; "voluntary third-party behavior" cannot give rise to a constitutional claim even if it is a response to state law. *See URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 10-11 (1st Cir. 2011).

Nor should KG's claims be deemed ripe on the theory that a decision on the merits would resolve some uncertainty that interferes with KG's ability to decide whether to spend more money to keep alive its bet on the New Bedford site. KG had spent millions of dollars on its

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[75] KG's Add.22a (district court order).

[76] KG's Add.21a (district court order).

[77] KG's Br. 1.

[78] KG relies on statements to that effect in the Supplemental Declaration of Andrew M. Stern. *See* KG's Br. 17-18, 57 (citing JA.47-48). Defendants moved to strike those statements on the ground that they were inadmissible opinion or inadmissible hearsay. JA.5, entry 23 (docket); JA.49-50 (motion to strike). The district court denied the motion to strike, but stated at the hearing on January 31, 2012, that it would disregard the challenged portions of this declaration.

plans even before casino gambling was legal in Massachusetts.[79] The district court's affirmance of § 91 does not mean that further investments by KG would be futile, since it remains possible that no compact will ever be recommended by the Governor or approved by the Legislature. Conversely, a ruling striking down § 91 would not give KG any certainty: KG would have to compete for a license in Region C, and the Commission would not have to issue a license even if KG turned out to be the only applicant. *See* Mass. Gen. L. c. 23K, §§ 17(g) & 19(a).

Furthermore, even if at some point KG could no longer seek or obtain a category 1 license, its investment to date would not be rendered worthless.[80] KG would remain free to apply for a category 2 license (i.e. slot machines only) or to develop its New Bedford site into something other than a gaming destination, and thus it would not be "inevitab[le]" that KG could never recoup its investment. *Cf. Gilbert v. City of Cambridge*, 932 F.2d 51, 63 n.15 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991) (failure of relatively "grandiose" development plan does not establish futility of "less ambitious plans" (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 347, 351-53 & n.9 (1986), a regulatory takings case)).

2. KG Waived Its Challenge to the Funding in § 2A.

Although KG asserts in a single sentence that the $5 million appropriation in § 2A, item 0411-1004, of the Act violates the Equal Protection Clause, it does not develop this argument.[81] KG has therefore waived this claim. *Ahmed v. Holder*, 611 F.3d 90, 98 (1st Cir.

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[79] JA.21-22, ¶¶ 44-48 (complaint).
[80] *Cf.* KG's Br. 16-17.
[81] KG's Br. 28.

2010) ("appellate arguments advanced in a perfunctory manner, unaccompanied by citations to relevant authority, are deemed waived"). KG cannot press these claims in its reply brief. *See In re FBI Distribution Corp.*, 330 F.3d 36, 41 n.6 (1st Cir. 2003) ("a party forfeits a claim on appeal where she failed to raise it with some effort at developed argumentation in her opening brief, and instead raised it for the first time in her reply brief").

This funding covers "costs associated with the implementation" of the Act "including, but not limited to, costs related to legal, financial and other professional services required for the negotiation and execution of a compact with a federally recognized Indian tribe in the commonwealth," as well as start-up costs to be incurred by the Commission. *See* Mass. St. 2011, c. 194, § 2A, item 0411-1004.

KG has never claimed that the Commonwealth may not negotiate a compact in accord with IGRA. KG's equal protection challenge to § 91 is based on the mistaken belief that it is unconstitutional for a State to allow tribal gaming on Indian lands without also allowing private companies like KG to open casinos elsewhere. But that claim has nothing to do with the $5 million appropriation in § 2A or the use of some of those funds to negotiate a Tribal-State compact.

Furthermore, this appropriation also covers costs that have nothing to do with negotiating a Tribal-State compact. Although the Commission's expenses will ultimately be covered by fees paid by license applicants and licensed gaming establishments,[82] the Commission needs an initial source of funding so that it can begin its work. KG does not claim that such funding is unconstitutional.

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[82] *See* Mass. Gen. L. c. 23K, § 15(11), § 56(c), & § 57.

3. KG Has No Standing to Challenge the Composition of an Advisory Committee Established in § 68(a).

KG lacks standing to challenge the provision in § 68(a) of the Act stating that one member of the Gaming Policy Advisory Committee ("GPAC") shall be a "representative of a federally recognized Indian tribe in the commonwealth." The district court correctly held that KG has not alleged any "justiciable injury caused by the appointment restriction."[83] *See Arakaki v. Hawaii*, 314 F.3d 1091, 1097-1098 (9th Cir. 2002) (no standing to challenge similar restriction on appointments to state Office of Hawaiian Affairs).

The GPAC has no regulatory authority over KG or anyone else. Although it may make recommendations regarding gaming policy, by law those suggestions "shall be advisory and shall not be binding." Mass. St. 2011, c. 194, § 68(a). The GPAC has no other role. Thus, there is no merit to KG's claim that *Buckley v. Valeo*, 424 U.S. 1, 115-118 (1976), gives it standing to challenge § 68(a). *Buckley* held, in relevant part, that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." 424 U.S. at 117. But the GPAC has no power to adjudicate or otherwise regulate anything.

[83] KG's Add.13a.

B. The Challenged Provisions Satisfy Equal Protection.

Section 91 of the Act would satisfy equal protection even if it led to a federally-recognized tribe opening the only casino in Region C.

A state law that allows tribes to operate casinos on Indian lands, but bars casinos elsewhere, is subject only to rational basis review and does not violate the Equal Protection Clause. *Artichoke Joe's*, 353 F.3d at 731-742 (9th Cir); *Garrett*, 122 Fed.Appx. at 630-633 (4th Cir.); *Flynt v. California Gambling Control Comm'n,* 104 Cal.App.4th 1125, 1129-1146, 129 Cal.Rptr.2d 167, 179 (Cal. Ct. App. 1st Dist. 2002), *cert. denied*, 540 U.S. 948 (2003). The courts in *Artichoke Joe's*, *Flynt*, and *Garrett* upheld California and North Carolina laws giving tribes exclusive rights to open casinos on Indian lands, under Tribal-State compacts pursuant to IGRA, while barring casinos elsewhere.

The district court correctly held that "[t]he equal protection principles articulated" by the Supreme Court "in *Mancari* and *Yakima* compel the same result in this case."[84] KG's assertion that the Act might lead to a tribal "monopoly" of casino gambling in Region C is irrelevant;[85] even if the term "monopoly" were apt, which it is not,[86] that would have "no bearing on identifying the appropriate standard under which to review the state law." *Artichoke Joe's*, 353 F.3d at 736 n.19.

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[84] KG's Add.30a.

[85] KG's Br. 10-11, 19, 23, 40, 43, 48.

[86] KG's reference to a southeastern Massachusetts "monopoly" cannot be squared with its assertion that "Massachusetts is a single market" for gaming. KG's P.I. Memorandum (doc. 9) at 16; *see also* JA.23, ¶ 52 (complaint). The presence or absence of monopoly power must be determined throughout the relevant geographic market, not in an artificially constrained area. *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197-198 (1st Cir.), *cert. denied*, 519 U.S. 527 (1996).

1. Several of KG's Arguments Do Not Even State an Equal Protection Claim.

a. Treating Some Counties Differently Than Others Raises No Equal Protection Issue.

That the Act may apply differently in the counties that comprise Region C than in the rest of Massachusetts does not distinguish this case from *Artichoke Joe's*, *Garrett*, or *Flynt*, and does not give rise to any equal protection problem.[87] "[T]he Equal Protection Clause relates to equality between persons …, rather than between areas;" "territorial uniformity is not a constitutional prerequisite." *McGowan v. State of Maryland*, 366 U.S. 420, 427 (1961) (rejecting equal protection challenge to Sunday Blue Law exceptions in one county but not others). Indeed, the Legislature would not have violated equal protection if had permanently barred casino gambling in Region C except on Indian lands. *See Artichoke Joe's*, 353 F.3d at 740. Geographic distinctions are the essence of zoning and other land-use rules; they create no equal protection problem. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 384-397 (1926); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 659 (10th Cir. 2006).

b. KG Cannot Challenge the Provisions Authorizing a Tribal-State Compact, as It Is Situated Differently than Indian Tribes.

Although KG purports to attack all parts of § 91 of the Act, its arguments only relate to the provisions of § 91(e) that direct the Commission to request license applications for Region C casinos if no Tribal-State compact is approved by the Legislature by July 31, 2012, or

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[87] *Cf.* KG's Br. 12-13, 25-26, 29, 40.

if the Commission thereafter determines that the compacting tribe will not have land taken into trust by the Secretary of the Interior.

KG cannot make out any claim that the other parts of § 91 violate the Equal Protection Clause. Those paragraphs authorize the Governor to "enter into a compact with a federally recognized tribe in the commonwealth," § 91(a); permit the Governor to call upon the Commission for "assistance … in negotiating such compact," § 91(b); provide that the Governor may only negotiate a compact with a tribe that has purchased or agreed to purchase land for a casino and scheduled an approval vote in the host community, § 91(c); and require that any Tribal-State compact be approved by the Legislature and include a disclosure of all financial interests in the proposed tribal casino, § 91(d).

The dismissal of KG's equal protection challenge to §§ 91(a)-(d) may be affirmed on the ground that KG alleged no facts plausibly suggesting that those provisions treat KG differently than similarly situated entities. *See Clark v. Boscher*, 514 F.3d 107, 114 (1st Cir. 2008) (affirming 12(b)(6) dismissal of equal protection claim on this ground). "Equal protection means that 'similarly situated persons are to receive substantially similar treatment from their government.'" *Kuperman v. Wrenn*, 645 F.3d 69, 77 (1st Cir. 2011) (quoting *Tapalian v. Tusino*, 377 F.3d 1, 5 (1st Cir. 2004)). But KG and Indian tribes are not similarly situated with respect to negotiating a Tribal-State compact. *See Mudarri v. State*, 147 Wash.App. 590, 614-615, 196 P.3d 153, 167-168 (Wash. App. Div. 2 2008), *rev. denied*, 166 Wash.2d 1003, 208 P.3d 1123 (2009) (private casino owner not similarly situated to tribe operating casino on Indian lands pursuant to Tribal-State compact and IGRA).

Although KG complains that it "is ineligible to negotiate with the Governor unless it partners with a federally recognized tribe,"[88] that is irrelevant because KG is situated quite differently than Indian tribes with sovereign rights to conduct gaming on Indian lands. "For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities,' … qualified to exercise many of the powers and prerogatives of self-government[.]" *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). In contrast, KG "is an equity development company that specializes in the redevelopment and adaptive re-use of urban brownfield sites."[89] KG cannot negotiate a compact to conduct casino gambling under IGRA because it is not an Indian tribe. *See* 25 U.S.C. § 2710.

Thus, the district court erred in holding, and KG errs in arguing, that KG has a ripe equal protection claim because "Governor Patrick has already begun negotiations with an Indian tribe but is currently foreclosed from entering into similar negotiations with private entities."[90] In fact, the Governor cannot negotiate a Tribal-State compact with KG or any other private entity that is not an Indian tribe.

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88 KG's Br. 45.

89 JA.11, ¶ 2 (complaint).

90 KG's Br. 21 (quoting Add.10a-11a).

2. The Challenged Provisions Are Subject Only to Rational Basis Review.

a. The Political Distinction Between Tribes and Others Is Not a Racial Classification.

The central thrust of KG's claim that § 91(e) of the Act violates equal protection is its mistaken assertion that "the Act grants exclusive access to an important concession to members of one racial group."[91] No matter how many times KG repeats its assertion that the Act discriminates on the basis of race, it will still be incorrect.[92]

In fact, none of the challenged statutory provisions concerns individual Native Americans or tribal members; all relate to rights of tribes under IGRA. The Act makes a political distinction between federally-recognized Indian tribes and all others, including businesses owned or controlled by Native Americans, not a racial classification between Native Americans and other individuals.

"Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local governance." *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994) (quoting *Santa Clara Pueblo v.*

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[91] KG's Br. 28.

[92] Noble prize-winner Daniel Kahneman reports that, because of the way that most people process information, repetition can be used to get an audience to accept inaccurate assertions. He explains:

> A reliable way to make people believe in falsehoods is frequent repetition, because familiarity is not easily distinguished from truth. Authoritarian institutions and marketers have always known this fact. But it was psychologists who discovered that you do not have to repeat the entire statement of a fact or idea to make it appear true.

Daniel Kahneman, THINKING, FAST AND SLOW, 63 (2011). KG repeats the words "race," "race-based," or "racial" 60 times or more in its brief.

Martinez, 436 U.S. 49, 55 (1978), and *Worcester v. Georgia*, 31 U.S. (6 Pett.) 515, 559 (1832)) (applying IGRA). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id*. (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). The unique political status of Indian tribes is underscored by the fact that federal recognition "establishes a 'government-to-government relationship' between the recognized tribe and the United States." *See United States v. Washington*, 593 F.3d 790, 801 (9th Cir. 2010) (en banc) (quoting 25 C.F.R. § 83.2).

The Supreme Court has repeatedly rejected KG's argument that tribes are nothing more than racial groups of persons sharing a similar ancestry.[93] "Federal regulation of Indian tribes … is governance of once-sovereign political communities; it is not to be viewed as legislation of a ' "racial" group consisting of "Indians" ....' " *United States v. Antelope*, 430 U.S. 641, 646 (1977) (quoting *Mancari*, 417 U.S. at 553 n.24).[94]

The same is true of state laws that treat activities by tribes on Indian lands differently than conduct of private businesses elsewhere. State laws that apply differently to Indian tribes or in Indian territory reflect "not a racial classification, but a political one," and thus are subject only to rational basis review when applying the Equal Protection Clause. *Squaxin Island Tribe v. Washington*, 781 F.2d 715,

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[93] KG's Br. 35-36.

[94] Indeed, even a preference for individual members of federally-recognized tribes, as distinguished from a preference for tribes themselves, would be "political rather than racial in nature" because it would "exclude many individuals who are racially to be classified as 'Indians.'" *Mancari*, 417 U.S. at 553 n.24.

722 (9th Cir. 1986) (upholding state law giving preferential treatment to tribal liquor enterprises); *accord Greene v. Commissioner of Minnesota Dept. of Human Services*, 755 N.W.2d 713, 726-729 (Minn. 2008) (upholding state law requiring tribal member to obtain services through tribal program); *New York Ass'n of Convenience Stores v. Urbach*, 92 N.Y.2d 204, 212-213, 699 N.E.2d 904, 908 (1998) (upholding state decision not to collect taxes from cigarette and motor fuel sales on Indian reservations). As the district court observed, "[i]f a classification is political when the federal government makes it, it is difficult to imagine that it could be anything other than political when a state or local government makes it."[95]

A state law that allows Indian tribes to open a casino pursuant to an IGRA-sanctioned compact, but does not allow casinos outside of Indian lands, makes a political distinction between federally-recognized tribes and the rest of the world: it is not a race-based classification and thus is not subject to strict scrutiny. *Garrett*, 122 Fed.Appx. at 632; *Flynt*, 104 Cal.App.4th at 1141-1145, 129 Cal.Rptr.2d at 179-182. As the Ninth Circuit explained in discussing IGRA:

> The operative terms of IGRA expressly relate only to tribes, not to individual Indians. Only tribes, not individual Indians, may enter into compacts with other sovereign governments. … Further, through IGRA's compacting process, and through its reliance on tribal governments and tribal ordinances to regulate class III gaming, the statute relates to tribal status and tribal self-government. **The very nature of a Tribal-State compact is political; it is an agreement between an Indian tribe, as one sovereign, and a state, as another**.

Artichoke Joe's, 353 F.3d at 734 (emphasis added).

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[95] KG's Add.26a

The same is true of the statutory provisions that KG is challenging. They make no racial classification, but instead authorize the Commonwealth to negotiate a compact with a federally-recognized Indian tribe pursuant to IGRA, allow the Governor to spend monies to cover the costs of such negotiations, address the impact on category 1 licensing in Region C of any such Tribal-State compact and the possibility that a tribe may get federal approval to open a casino on current or future Indian lands, and require that one member of a new advisory committee be a representative of a federally-recognized tribe. Mass. St. 2011, c. 194, §§ 2A, 68(a), & 91. Native Americans receive no preference under the Act. If individual Native Americans wanted to operate a casino in Massachusetts, they would have to apply and compete for a commercial license issued by the Commission.

For this reason, and as the Ninth Circuit made clear in *Artichoke Joe's*, its prior holding in *Williams v. Babbitt*, 115 F.3d 657, 664-665 (9th Cir. 1997), *cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998), is irrelevant.[96] *Williams* rejected the view that "the Reindeer Act granted a preference to individual native Alaskans, who belonged to no tribal organization, that allowed them to engage in reindeer herding anywhere in Alaska, free from competition. So construed, the Act would not relate 'to Indian land, tribal status, self-government or culture,'" but instead would constitute a racial classification and be subject to strict scrutiny. *Artichoke Joe's*, 353 F.3d at 734 (quoting *Williams*, 115 F.3d at 664).

KG's "suggestion that *Williams* controls the outcome of the present case ignores the obvious distinctions between an unqualified

[96] *Cf.* KG's Br. 31-32.

preference for individual native Alaskans and the limited preference for tribes reflected in the text of IGRA" and in § 91 of the Act. *Artichoke Joe's*, 353 F.3d at 734; *accord Garrett*, 122 Fed.Appx. at 632. KG's reliance on the district court decisions in *Tafoya*, *Kornhass Constr.*, and *Malabed*, and the state court decision in *Santos Y.*, is similarly misplaced.[97] Those decisions also concerned laws that gave preferences to individual Native Americans, not laws making a political distinction between sovereign Indian tribes and other entities. *See Tafoya v. City of Albuquerque*, 751 F.Supp. 1527 (D.N.M. 1990) (ordinance allowing tribal members but not others to sell wares in Old Town Zone); *Kornhass Constr. v. Oklahoma*, 140 F.Supp.2d 1232, 1249 (W.D.Okla. 2001) (application of bid preference for minority-owned businesses to private business owned by individual Native Americans); *Malabed v. North Slope Borough*, 42 F.Supp.2d 927 (D.Alaska 1999), *aff'd on other grounds*, 335 F.3d 864 (9th Cir. 2003) (employment preference for individual Native Americans); *In re Santos Y.*, 92 Cal.App.4th 1274, 112 Cal.Rptr.2d 692 (Cal. Ct. App. 2d Dist. 2001) (application of federal Indian Child Welfare Act to adoption of child whose mother is enrolled member of Indian tribe). KG has not identified any decision that applied strict scrutiny to a law that distinguished between federally-recognized Indian tribes and others.

b. Section 91 Was Enacted Under Explicit Authority Granted by Congress in IGRA.

There is a second reason why the challenged provisions of the Act are subject to rational basis review. As the district court explained, "if Congress delegates a portion of its Indian regulatory authority to the

[97] *Cf.* KG's Br. 33-34

states, a state law enacted pursuant to that delegated authority is subject to rational basis review as if it were federal law."[98] *Accord Artichoke Joe's*, 353 F.3d at 734. The Supreme Court so held in *Yakima Indian Nation*, 439 U.S. at 495-502, which upheld a state law exercising jurisdiction over Indian lands where Congress had authorized, but not required, States to do so. *Id*. The Court reasoned as follows.

Congress has "plenary power over Indian affairs" and may "enact legislation singling out Indian tribes." *Yakima Indian Nation*, 439 U.S. at 501. Any congressional exercise of that power in a way that treats Indian tribes or their members differently, such as in IGRA, does not constitute invidious discrimination but instead is subject only to rational basis review. *Mancari*, 417 U.S. at 551-555. Similarly, if a State chooses to follow the federal lead, and adopts a law regarding rights of Indian tribes or their members that was authorized by Congress, the state law will also satisfy equal protection so long as it has a rational basis; strict scrutiny will not apply. *Yakima Indian Nation*, 439 U.S. at 500-502; *accord Artichoke Joe's*, 353 F.3d at 733-736.

Like the California law at issue in *Artichoke Joe's*, the provisions of the Act regarding a possible Tribal-State compact were "enacted in response to IGRA," make classifications that "echo those made in IGRA," and were adopted under "the authority that Congress had granted to the State[s] in IGRA." *See Artichoke Joe's*, 353 F.3d at 736.

Congress has authorized States to permit tribes to operate tribal casinos on Indian land, pursuant to a Tribal-State compact negotiated under IGRA, whether or not the State allows other casinos to operate

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[98] KG's Add.30a.

elsewhere. *Artichoke Joe's*, 353 F.3d at 720-731; *McCracken & Amick, Inc. v. Perdue*, 201 N.C.App. 480, 486-493, 687 S.E.2d 690, 694-698 (2009), *rev. denied*, 364 N.C. 241, 698 S.E.2d 400 (2010); *Flynt*, 104 Cal.App.4th at 1137-1140, 129 Cal.Rptr.2d at 177-178. States may compact with tribes over class III gaming on Indian lands. 25 U.S.C. § 2710(d)(3). And IGRA provides that tribes may operate class III gaming on Indian lands in any "State that permits such gaming for any purpose by any person, organization, or entity." *Id.* § 2710(d)(1)(B). Because Indian tribes are an organization or entity within the meaning of § 2710(d)(1)(B), IGRA authorizes States to negotiate compacts to govern tribal casinos and permit class III tribal gaming on Indian lands even if state law bars casinos outside of Indian lands. *See Artichoke Joe's*, *McCracken*, and *Flynt*, *supra*. If the phrase "permits such gaming" in § 2710(d)(1)(B) were construed to require more than a state law that authorizes a Tribal-State compact, such a requirement would be met here because the Act authorizes up to three casinos as well as one category 2 (slot machines only) gaming establishment outside of Indian lands. *See* Mass. Gen. L. c. 23K, §§ 19, 20

In sum, § 91 was adopted under explicit authority granted by Congress in IGRA, and thus *Yakima Indian Nation* requires that rational basis review apply to KG's equal protection claim. *See Artichoke Joe's*, 353 F.3d at 736; *see also Greene*, 755 N.W.2d at 717-718, 727 (*Yakima* requires that rational basis review be applied to state law establishing tribal benefits program authorized by Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

KG is wrong to argue that § 91 is not authorized by IGRA because it allows the Governor to negotiate a compact with a tribe that does not

yet have Indian lands.[99] The Secretary of the Interior has construed IGRA as authorizing a Tribal-State compact for gaming on land that has not yet been taken into trust by the United States, where the Secretary approves the compact subject to the conditions that the casino may only be opened if the lands are subsequently "acquired in trust by the Secretary for the tribe" and use of those lands for gaming is approved by the Secretary and Governor of the State pursuant to 25 U.S.C. § 2719(b)(1)(A). *See* Bureau of Indian Affairs, Warm Springs Compact Notice, 76 FR 11258.

Nor is there any merit to KG's assertion that IGRA cannot apply in Massachusetts because *Carcieri v. Salazar*, 555 U.S. 379 (2009), bars the Secretary of the Interior from taking land "into trust for Indian tribes, such as the Mashpee, that were recognized by the federal government after 1934."[100] *Carcieri* construed the Indian Reorganization Act of 1934, which authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians," 25 U.S.C. § 465, and defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," 25 U.S.C. § 479. Although *Carcieri* holds that the Secretary may only take land into trust for a tribe that was "under federal jurisdiction" as of 1934, *see* 555 U.S. at 387-391, a tribe that was not formally recognized by the United States until later may nonetheless be able to show that it existed and was under federal jurisdiction as of 1934. *Id.* at 397-398 (Breyer, J., concurring) & 400 (Souter and Ginsburg, JJ., concurring in part and dissenting in part).

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[99] KG's Br. 39-43.

[100] KG's Br. 8; *accord id.* 41.

The statute "imposes no time limit on recognition." *Id.* at 398 (Breyer, J.) & 400 (Souter, J.). "The fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time." *Id.* at 400 (Souter, J). In *Carcieri*, the Secretary could not take land into trust only because the Narragansett Indian Tribe had conceded it was not under federal jurisdiction as of 1934. *Id.* at 395-396 (majority), 399 (Breyer, J.).

If KG's reading of *Carcieri* were correct, however, that would merely provide yet another reason why its equal protection claims are conjectural and not ripe. *See* pages 18-21, above. If *Carcieri* actually barred the Secretary from taking land into trust in Massachusetts, then presumably the Secretary would disapprove any Tribal-State compact in Massachusetts on that ground. *Cf.* 25 U.S.C. § 2710(d)(8)(B). And if that were to happen, then the Commission would proceed to solicit applications for a casino license in Region C. *See* Mass. St. 2011, c. 194, § 91(e) (Commission to solicit applications if, although Tribal-State compact is approved by July 31, 2012, Commission later "determines that the tribe will not have land taken into trust by the United States Secretary of the Interior").

But the chance that a Tribal-State compact negotiated by the Commonwealth could be disapproved by the Secretary does not mean that, on its face, § 91 is not authorized by IGRA. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-450 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

3. The Challenged Provisions Have Rational Bases and Thus Satisfy Equal Protection.

The district court held that the challenged provisions of the Act meet the rational basis test.[101] KG made no claim to the contrary before the district court or in its appellate brief.[102] It has therefore waived any claim that the Act lacks a rational basis. *See McCullen v. Coakley*. 571 F.3d 167, 182 (1st Cir. 2009), *cert. denied*, 130 S.Ct. 1881 (2010).

It is unsurprising that KG does not press this point. Under rational basis review, KG could overcome the Act's "strong presumption of validity … only by demonstrating that there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." *Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 53-54 (1st Cir. 2005) (internal quotation marks and citations omitted). KG could not meet that heavy burden.

It was rational for the Legislature to authorize the Governor to negotiate a Tribal-State compact in accord with IGRA and to spend funds to cover related costs. "IGRA's drafters conceived of the Tribal-State compact as 'the best mechanism to assure that the interests of both [federally-recognized tribes and States] are met with respect to the regulation of complex gaming enterprises'" on Indian lands. *Artichoke Joe's*, 353 F.3d at 726 (quoting S. Rep. No. 100-446, at 13, reprinted in 1988 U.S.C.C.A.N. 3071, 3083 (1988)).

Such a compact will also further the important goals of promoting tribal economic development and self-sufficiency, and of determining

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101 KG's Add.31a.

102 *Cf.* JA.24-26, ¶¶ 54-71 (complaint).

how gaming and related activities on Indian lands will be regulated; thus negotiating a compact has a rational basis. *See* 25 U.S.C. § 2702; *Garrett*, 122 Fed.Appx. at 633; *Artichoke Joe's*, 353 F.3d at 731, 736.

The Legislature could also have rationally concluded that it was in the public interest to promote economic development opportunities by allowing up to one such casino in each of the three regions defined in the Act, but not to have more than one such gaming establishment in any region. A statute that regulates gaming venues in order to promote economic development has a rational basis. *See Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 109-110 (2003) (differential tax rate favoring intrastate racetrack over intrastate riverboat gambling had rational basis and thus satisfied equal protection). Section 91(e), which provides that the new Commission shall solicit category 1 applications for Region C if no Tribal-State compact is negotiated by July 31, 2012, or if the Commission determines that the tribe will not have land taken into trust by the United States, rationally furthers this objective.

It was thus rational for the Legislature to reduce the chance that southeastern Massachusetts could end up hosting multiple casinos with slot machines and table games, one on Indian lands and authorized under IGRA and the other licensed under Massachusetts law. The Legislature could rationally have concluded that the Mashpee Wampanoag Tribe might be able to open a casino under federal law if it could convince the Secretary of the Interior to take land into trust for its benefit (*see* pages 8-13, above), and that the Aquinnah Tribe waived any sovereign right to open a casino when it settled its Martha's

Vineyard land claims.[103] But even if the Legislature might have thought that the Aquinnah did not waive all sovereign rights to open a casino on

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[103] The Aquinnah tribe agreed "to hold its land … 'in the same manner, and subject to the same laws, as any other Massachusetts corporation.'" *Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, 13, 818 N.E.2d 1040, 1049 (2004). The Legislature could have rationally concluded that Congress, when it approved this settlement agreement in the "Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987," 25 U.S.C. §§ 1771 et seq., waived any sovereign right of the Aquinnah to engage in gaming under IGRA and "specifically provide[d] for exclusive state control over gambling." *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1341 (D.C. Cir. 1998) (construing § 1771g); *accord Narragansett Indian Tribe*, 19 F.3d at 702 (construing § 1771e and § 1771g).

With respect to the settlement lands on Martha's Vineyard, the tribe waived its sovereign rights and agreed to be bound by all state laws, including those that prohibit or regulate gaming. *See* 25 U.S.C. § 1771e(a) (the Aquinnah "shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of … the civil regulatory and criminal laws of the Commonwealth of Massachusetts"); 25 U.S.C. § 1771g (any lands owned by or held in trust for a tribe in Gay Head, Massachusetts, "shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)").

The same rules apply to any other lands that may be acquired by or held in trust for the Aquinnah in the Commonwealth. *See* 25 U.S.C. § 1771d(c) ("Any after acquired land [in the town of Gay Head] held in trust for the Wampanoag Tribal Council of Gay Head, Inc., any successor, or individual member, shall be subject to the same benefits and restrictions as apply to the most analogous land use described in the Settlement Agreement."); § 1771d(g) ("Any land acquired by the Wampanoag Tribal Council of Gay Head, Inc., that is located outside the town of Gay Head shall be subject to all the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts.").

new land that the United States might take into trust on the tribe's behalf, it would have been rational for the Legislature to reduce the chance that the southeastern part of Massachusetts could end up hosting two tribal casinos on Indian lands and in addition host a third casino operating under a commercial license from the Commission.

Finally, it was rational to require that one of the fourteen Gaming Policy Advisory Committee members—whose recommendations "shall be advisory and shall not be binding on the commission"—be a representative of a federally recognized Indian tribe. *See* Mass. St. 2011, c. 194, § 68(a). Under IGRA, tribes that have not waived their sovereign rights to engage in gaming have a particular interest in and perspective on gaming. It was reasonable to conclude that this purely advisory body would benefit from that perspective.

II. THE STATE CONSTITUTIONAL CLAIM WAS PROPERLY DISMISSED.

A. KG Cannot Argue for the First Time on Appeal that a Massachusetts Equal Protection Provision Is More Stringent than the United States Constitution.

KG now argues that even if "Section 91 is subject only to rational basis review under *Yakima*," which applied the Fourteenth Amendment, the Court "should nonetheless apply strict scrutiny under [Article 1 of] the Massachusetts Declaration of Rights."[104] But KG never pressed this theory below. KG told the district court that "[t]he 'standard for equal protection analysis' under the Declaration of Rights 'is the same as under the Federal Constitution,'"[105] and made clear that

[104] KG Br. 50.

[105] JA.26, ¶ 68 (complaint, quoting *Brackett*, 447 Mass. at 243, 850 N.E.2d at 545); KG's P.I. memo (doc. 9) at 2 n.1.

KG's state law claim added nothing of substance.[106] When KG filed a supplemental memorandum invoking the Supreme Judicial Court's recent decision in *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 959 N.E.2d 970 (2012) ("*Finch II*"), it argued only that *Finch II* "further demonstrates that the Act violates the Equal Protection Clause and [the] Declaration of Rights."[107]

Having argued below that cognate provisions of the Massachusetts Declaration of Rights and United States Constitution "are coextensive,"[108] KG cannot assert on appeal that the Declaration of Rights is "even more protective" than the Fourteenth Amendment.[109] *See National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 748-749 (1st Cir.), *cert. denied*, 515 U.S. 1103 (1995).

B. The Commonwealth's Sovereign Immunity Bars KG's State Law Claim.

KG could not win relief under the Massachusetts Constitution even if it had pressed a separate state law claim below. "In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Supreme Court decided that sovereign immunity prohibits federal courts from ordering state officials to conform their conduct to state law." *Cuesnongle v. Ramos*, 835 F.2d 1486, 1496 (1st Cir. 1987). *Pennhurst* governs here, even though the Commonwealth had no reason to invoke it below in opposing KG's motion for injunctive relief.[110]

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[106] KG's P.I. memo (doc. 9) at 17-29.
[107] KG's Supp'l Memo (doc. 19) at 3.
[108] KG's Add.24a.
[109] KG's Br. 47.
[110] "Because the [Eleventh] Amendment deprives federal courts of jurisdiction to entertain claims against states, the immunity may be

"While *Ex Parte Young*, 209 U.S. 123 (1908), permits injunctive relief based on federal constitutional claims, it does not allow injunctive relief against state officials for violation of state law, which is the issue here." *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 43 (1st Cir. 2006) (applying *Pennhurst*). "There are two options for a post-*Pennhurst* plaintiff who wishes to bring a claim for injunctive relief against state officials under alternative federal and state theories: either to litigate both federal and state claims in state court, or to bifurcate the litigation so that the state claims are heard in state court and the federal claims are heard in federal court." *Cuesnongle*, 835 F.2d at 1497. KG failed to pursue either of these options.

C. *Finch* Concerned Eligibility Rules for Aliens, Not Laws Concerning Tribal Gaming.

KG's reliance on the Massachusetts Supreme Judicial Court's decisions in the *Finch* case would be misplaced even if KG's state law claim were not otherwise barred. The district court correctly distinguished *Finch*, and the other cases that KG invoked by analogy concerning state laws that affect persons who are not United States citizens,[111] on the ground that any national uniformity requirement with respect to the treatment of aliens does not apply to State laws exercising authority over Indian tribes that Congress has delegated to

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raised at any point in a proceeding, including for the first time on appeal." *Torres v. Puerto Rico Tourism Co.*, 175 F.3d 1, 4 (1st Cir. 1999). In any case, "waiver is not applicable" here because the Court "may affirm a district court judgment on any 'independently sufficient ground,' including one not raised below." *Jodoin v. Toyota Motor Corp.*, 284 F.3d 272, 277 n.2 (1st Cir. 2002) (quoting *Olsen v. Correiro*, 189 F.3d 52, 58 (1st Cir.1999)).

[111] *See* KG's P.I. Memorandum (doc. 9) at 22 n.13.

the States.[112] With respect to alienage, Congress has the power "to establish a uniform Rule of Naturalization." U.S. Const., Art. 1, § 8. In contrast, the congressional power to "regulate Commerce … with the Indian Tribes" has no such uniformity requirement. *Id.*

The Supreme Court has held that States may legislate with respect to Indian tribes and Indian lands where Congress authorizes but does not mandate such state laws, subject only to rational basis review. *Yakima Indian Nation*, 439 U.S. at 501-502. Nothing in *Finch* suggests that the SJC, in applying the Massachusetts Declaration of Rights, would disregard *Yakima Indian Nation* and subject § 91 of the Act to strict scrutiny. To the contrary, the SJC's holding in *Finch* "rests entirely on the court's interpretation of United States Supreme Court equal protection decisions." *Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 686 n.9, 946 N.E.2d 1262, 1285 n.9 (2011) ("*Finch I*") (Gants, J., concurring in part and dissenting in part); *accord Finch II*, 461 Mass. at 246-247, 959 N.E.2d at 982.

Finch concerned an eligibility standard that Congress established in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and that the Massachusetts Legislature incorporated by reference into a state health insurance program. *Finch I*, 459 Mass. at 656, 946 N.E.2d at 1265. The SJC held that, under *Graham v. Richardson*, 403 U.S. 365 (1971), the challenged rule was subject to strict scrutiny because it classified applicants based on alienage. *Finch I*, 459 Mass. at 671-674, 946 N.E.2d at 1275-1277. It concluded that state laws concerning alienage that are authorized but not

[112] KG's Add.33a-34a. KG is wrong when it asserts that the district court failed to address and distinguish *Finch*. KG's Br. 49.

mandated by Congress are subject to strict scrutiny, even though a similar law adopted by Congress under its plenary authority to regulate immigration would only be subject to rational basis review. *Id.* It also agreed with the Supreme Court that "if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction," subject only to rational basis review. *Finch II*, 461 Mass. at 245, 959 N.E.2d at 981 (quoting *Plyler v. Doe*, 457 U.S. 202, 219 n.9 (1982)).

The SJC grounded this distinction—between alienage classifications merely authorized by Congress and similar classifications that are mandated by federal law—in the fact that Congress has the power to establish uniform rules concerning naturalization. *Finch II*, 461 Mass. at 245-247, 959 N.E.2d at 981-982. It reasoned that subjecting both sorts of state laws concerning aliens to rational basis review "would render superfluous the threshold determination whether Congress has enacted a uniform mandate." *Id.*, 461 Mass. at 246, 959 N.E.2d at 982 (citing *Plyler* and *Graham*).

But the holding in *Finch* regarding aliens' eligibility for benefits has no bearing on the provisions in § 91 of the Act concerning negotiation of a Tribal-State compact as authorized by IGRA. The SJC is unlikely to create from thin air a uniformity rule under which § 91, which has nothing to do with alienage, is subject to strict scrutiny because it is "not mandated by any uniform federal program."[113]

[113] KG's Br. 49.

III. THE IGRA PREEMPTION CLAIM WAS PROPERLY DISMISSED.

A. KG Waived This Claim on Appeal.

KG does not challenge the district court's dismissal of KG's claim that the Act violates and thus is preempted by IGRA. KG does not mention this claim in its statement of the issue on appeal or in its summary of argument,[114] and it does not argue that the district court's resolution of this claim was in error.

The district court held there is no conflict between Massachusetts law and IGRA because no provision of Massachusetts law allows tribal gaming on Indian lands except pursuant to IGRA, and "tribal and non-tribal entities alike" may only open a casino outside of Indian lands under a license issued by the Gaming Commission.[115] Section 91 of the Act "does not create a separate tribal gaming regime in Massachusetts but rather establishes the procedures by which IGRA-authorized compacting may take place under Massachusetts law."[116] The court correctly held that IGRA does not preempt § 91 because this state law "advances the congressional directive that tribes and states negotiate compacts to govern gaming on tribal lands," because "nothing in § 91 prevents simultaneous compliance with IGRA," and because § 91 "neither conflicts with nor frustrates the purpose of IGRA."[117] *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605-606, 614-616 (1991); *Grant's Dairy-Maine, LLC v. Commissioner of Maine Dept. of Agric.*, 232 F.3d 8, 15-18 (1st Cir. 2000).

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[114] KG's Br. 1, 23-27.
[115] KG's Add.21a-23a
[116] KG's Add.21a.
[117] KG Add.17a, 18a, 24a.

KG now concedes that, construed in this manner, the Act is ***not*** preempted by IGRA.[118] KG has therefore waived this claim. *E.g., Ramos v. Patnaude*, 640 F.3d 485, 489 (1st Cir. 2011). Although KG questions whether "this is the best reading of the Act," it does not press the point. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Feliciano-Hernandez v. Pereira-Castillo*, 663 F.3d 527, 537 n.5 (1st Cir. 2011) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). KG cannot press this claim in its reply brief. *See In re FBI Distribution Corp.*, 330 F.3d at 41 n.6. If there were any doubt about whether the district court construed § 91 correctly, then *Pullman* abstention would have been required and the court would have had to stay consideration of the preemption claim until KG pressed a ripe claim to a final decision in state court as to whether the Act allows a tribe to open a casino without either complying with IGRA or winning a license from the Gaming Commission.[119]

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[118] KG's Br. 52-54.

[119] Abstention would be required under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 499–502 (1941), because the Act has never been interpreted by a state court and is "fairly subject to an interpretation which will avoid … the federal constitutional question" raised in KG's preemption claim. *Barr v. Galvin*, 626 F.3d 99, 108 (1st Cir. 2010) (quoting *Zwickler v. Koota*, 389 U.S. 241 (1967)) (vacating decision on the merits because *Pullman* abstention was required). The lack of any pending state court proceeding does not affect the necessity of *Pullman* abstention. *Barr*, 626 F.3d at 108 n.3.

B. KG Is Not Entitled to Declaratory Relief Regarding the Interplay of State Law and IGRA.

Although KG does not press its IGRA preemption claim, it nonetheless asks the Court to declare "that any tribal gaming" in Massachusetts "must be conducted in full compliance with all relevant requirements of IGRA." There are at least four reasons why it would be inappropriate to grant such relief.

First, KG may not obtain any relief against the Governor or Gaming Commissioners in the absence of any violation of federal law. *See Green v. Mansour*, 474 U.S. 64, 73 (1985) (Eleventh Amendment bars declaratory relief against state official in absence of "continuing violation of federal law"); *Mills v. State of Maine*, 118 F.3d 37, 55 (1st Cir. 1997) (same). Since KG does not challenge the district court's finding that the Act is not preempted by IGRA, KG is not entitled to any relief under this claim.

Second, IGRA is not enforceable in an action seeking declaratory or injunctive relief against state officials. In its complaint, KG alleged that § 91 of the Act conflicts with 25 U.S.C. § 2710(d).[120] But Congress provided that § 2710(d) could only be enforced in an action brought against a State by a tribe or by the Secretary of the Interior. *Seminole Tribe*, 517 U.S. at 73-76. The Supreme Court has held that as a result IGRA may not be enforced in an action brought under *Ex Parte Young*, even though the Court simultaneously held that Congress had no power under the Indian Commerce Clause to waive States' sovereign immunity. *Id.* As the Court has explained, *Seminole Tribe* holds that Congress "foreclosed recourse" to the *Ex Parte Young* doctrine to

[120] JA.19-20 (¶¶ 37-39), JA.27 (¶¶ 75-80) (complaint).

vindicate IGRA. *See Virginia Office for Protection and Advocacy v. Stewart*, 131 S.Ct. 1632, 1639 n.3 (2011).

Third, KG's formulation is inaccurate because "IGRA regulates activities only on Indian lands. … Once outside, the tribes shed their sovereignty and are fully amenable to state law." *Artichoke Joe's*, 353 F.3d at 735. KG has never claimed that IGRA would bar a tribe from competing for a license, issued by the Commission under state law, to conduct gaming outside of Indian territory.

Finally, KG is trying to get declaratory relief against Tribes that are not parties to this case, which it cannot do. *Cf. Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 48 n.12 (1st Cir. 2012).

IV. THE CHALLENGED PROVISIONS OF THE ACT ARE SEVERABLE.

The relief sought by KG would be overbroad even if KG had proved its case by showing that it would be unconstitutional for Massachusetts to pursue a Tribal-State compact under IGRA without also licensing a casino in Region C outside of Indian lands, or that it would be unconstitutional to reserve one seat on the Gaming Policy Advisory Committee for a representative of a federally-recognized Indian tribe, or both.

KG asks the Court to "remand with instructions to enter judgment in favor of KG and permanently enjoin the challenged provisions."[121] KG does not specify what it means, but it appears to be seeking an injunction that would bar implementation of § 2A (item 0411-1004), § 68(a), and § 91 in their entirety.

[121] KG's Br. 54-55.

Under Massachusetts law, "[t]he provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof." Mass. Gen. L. c. 4, § 6, clause eleventh. KG would not be entitled to enjoin provisions of the Act that are constitutional. *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1023 (1st Cir. 1981).

Section 2A: There would be no basis for enjoining the appropriation of $5 million in start-up funding in § 2A, item 0411-1004 even if § 91(e) were invalid. KG does not claim that spending money on Commission expenses would be unconstitutional. Having waived its IGRA preemption claim, KG does not even claim that spending money on efforts to negotiate a Tribal-State compact would be unlawful.

And KG has never challenged the separate appropriation of $500,000 for the operation of the new Division of Gaming Enforcement within the Attorney General's Office, in item 0810-1204 of § 2A. KG cannot obtain an injunction of that separate appropriation.

Sections 91(a)-(d): Nor would there be any basis for enjoining §§ 91(a)-(d), which authorize the Governor to negotiate a Tribal-State compact. KG's equal protection claim only challenges § 91(e), which is the provision indicating that the Commission should refrain from accepting any applications for a category 1 license in Region C if a compact is approved by July 31, 2012, unless the Commission determines that the tribe will not have land taken into trust by the Secretary of the Interior. *See* pages 25-28, above. Negotiating a compact as authorized in IGRA would not violate equal protection. Thus, § 91(e)

would be severable even if KG's equal protection challenge was ripe and § 91(e) were unconstitutional, which it is not.

KG cannot ask the Court to rewrite the Act and require the Commission to consider applications for a casino license in Region C at the same time that it considers applications for other regions, or even to do so at all. *See Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999) ("Courts have an obligation to refrain from embellishing statutes by inserting language that [the Legislature] opted to omit."). The Legislature did not impose any such obligation with respect to Regions A and B, but instead gave the Commission broad discretion to decide whether and when to request applications, to accept applications from different regions at different times, and to grant a license in one or two regions but not in the third. *See* Mass. Gen. L. c. 23K, §§ 17(g), 19(a). The court may not "create by judicial fiat" new statutory requirements that the Legislature did not impose. *Aulson v. Blanchard*, 83 F.3d 1, 4 (1st Cir. 1996).

Section 68(a): Even if it were unconstitutional to reserve one seat on the Gaming Policy Advisory Committee for "a representative of a federally recognized Indian tribe in the Commonwealth," and even if KG had standing to raise this claim, the quoted clause would be severable from the rest of § 68(a). There is no ground for barring the Commonwealth from having an advisory committee that includes the other specified members.

Conclusion.

The judgment dismissing KG's claims should be affirmed. KG failed to allege any facts plausibly suggesting that the Act violates the Equal Protection Clause. KG waived its state law claim, which in any case is barred by *Pennhurst* and without merit. KG does not press and thus has waived its IGRA preemption claim.

Even if KG had shown that § 91(e) of the Act—which suggests that the Commission should refrain from considering applications for casino licenses in Region C if a Tribal-State compact is concluded by July 31, 2012, unless the Commission determines that the tribe will not have land taken into trust by the United States—violates the Fourteenth Amendment, which it has not, the only relief to which KG would be entitled would be forward-looking declaratory or injunctive relief against implementation of § 91(e).

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April 19, 2012

Certificate of Compliance with FRAP 32(a)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,993 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word in Microsoft Office Professional Plus 2010.

/s/ Kenneth W. Salinger

Certificate of Filing and Service

I hereby certify that this document was filed through the Electronic Case Filing (ECF) system on April 19, 2012, and thus copies will be sent electronically by that system to counsel for all parties in the case, as follows: Paul D. Clement and Jeffrey M. Harris; Bancroft PLLC; 1919 M Street, NW, Suite 470; Washington, DC 20036; pclement@bancroftpllc.com.

/s/ Kenneth W. Salinger

Addendum.

Mass. St. 2011, c. 194, § 2A

OFFICE OF THE GOVERNOR

0411-1004 To provide for certain costs associated with the implementation of expanded gaming including, but not limited to, costs related to legal, financial and other professional services required for the negotiation and execution of a compact with a federally recognized Indian tribe in the commonwealth to establish a tribal casino in region C.....$5,000,000

[OFFICE OF THE ATTORNEY GENERAL]

0810-1204 For the implementation and operation of the division of gaming enforcement within the department of the attorney general, established in section 11M of chapter 12 of the General Laws, for the investigation and prosecution of criminal activity relating to legalized gaming in the commonwealth pursuant to chapter 23K of the General Laws.....$500,000

Mass. St. 2011, c. 194, § 68(a)

There shall be a gaming policy advisory committee to consist of the governor or the governor's designee, who shall serve as chair, the commission chair, 2 members of the senate of whom 1 shall be appointed by minority leader, 2 members of the house of representatives of whom 1 shall be appointed by the minority leader, the commissioner of public health or the commissioner's designee and 8 persons to be appointed by the governor, of whom 3 shall be representatives of gaming licensees, 1 shall be a representative of a federally recognized Indian tribe in the commonwealth, 1 shall be a representative of organized labor and 3 shall be appointed from the vicinity of each gaming establishment, as defined by the host community and surrounding communities, upon determination of the licensee and site location by the commission. The committee shall designate subcommittees to examine community mitigation, compulsive gambling and gaming impacts on cultural facilities and tourism. Members of the committee shall serve for 2-year terms. The committee shall meet at least once annually for the purpose of discussing matters

of gaming policy. The recommendations of the committee concerning gaming policy made under this section shall be advisory and shall not be binding on the commission.

Mass. St. 2011, c. 194, § 91

(a) Notwithstanding any general or special law or rule or regulation to the contrary, the governor may enter into a compact with a federally recognized Indian tribe in the commonwealth.

(b) The Massachusetts gaming commission shall, upon request of the governor, provide assistance to the governor in negotiating such compact.

(c) The governor shall only enter into negotiations under this section with a tribe that has purchased, or entered into an agreement to purchase, a parcel of land for the proposed tribal gaming development and scheduled a vote in the host communities for approval of the proposed tribal gaming development. The governing body in the host community shall coordinate with the tribe to schedule a vote for approval of the proposed gaming establishment upon receipt of a request from the tribe. The governing body of the host community shall call for the election to be held not less than 60 days but not more than 90 days from the date the request was received.

(d) A compact negotiated and agreed to by the governor and tribe shall be submitted to the general court for approval. The compact shall include a statement of the financial investment rights of any individual or entity which has made an investment to the tribe, its affiliates or predecessor applicants of the tribe for the purpose of securing a gaming license for that tribe under its name or any subsidiary or affiliate since 2005.

(e) Notwithstanding any general or special law or rule or regulation to the contrary, if a mutually agreed-upon compact has not been negotiated by the governor and Indian tribe or if such compact has not been approved by the general court before July 31, 2012, the commission shall issue a request for applications for a category 1 license in Region C pursuant to chapter 23K of the General Laws not later than

October 31, 2012; provided, however, that if, at any time on or after August 1, 2012, the commission determines that the tribe will not have land taken into trust by the United States Secretary of the Interior, the commission shall consider bids for a category 1 license in Region C under said chapter 23K.

Mass. Gen. L. c. 23K, § 17

(a) After a review of the entire application and any independent evaluations, the commission shall identify which communities shall be designated as the surrounding communities of a proposed gaming establishment; provided, however, that any community that has negotiated a surrounding community memorandum of understanding with the applicant that was submitted with the application shall be considered a surrounding community by the commission. In making that determination, the commission shall consider the detailed plan of construction submitted by the applicant, information received from the public and factors which shall include, but not be limited to, population, infrastructure and distance from the gaming establishment and political boundaries. If the commission determines a city or town to be a surrounding community and the applicant has not finalized negotiations with that community in its application pursuant to section 15, the applicant shall negotiate a signed agreement with that community within 30 days and no action shall be taken on its application prior to the execution of that agreement. Notwithstanding clause (9) of said section 15, in the event that an applicant and a surrounding community cannot reach an agreement within the 30-day period, the commission shall have established protocols and procedures for ensuring the conclusion of a negotiation of a fair and reasonable agreement between an applicant and a surrounding community in order to allow the applicant to submit a timely and complete application.

(b) After a review of the entire application and any independent evaluations, the commission shall identify which live entertainment venues shall be designated as impacted live entertainment venues of a proposed gaming establishment; provided, however, that any live entertainment venue that has negotiated an agreement with the applicant that was submitted with the application shall be considered an impacted live entertainment venue by the commission. If the

commission determines a live entertainment venue to be an impacted live entertainment venue and the applicant has not finalized negotiations with that live entertainment venue in its application pursuant to section 15, the applicant shall negotiate a signed agreement with that live entertainment venue within 30 days and no action shall be taken on its application prior to the execution of that agreement. Notwithstanding clause (10) of said section 15, in the event an applicant and an impacted live entertainment venue cannot reach an agreement within the 30-day period, the commission shall have established protocols and procedures for ensuring the conclusion of a negotiation of a fair and reasonable agreement between an applicant and an impacted live entertainment venue in order to allow the applicant to submit a timely and complete application. A gaming licensee's compliance with such agreements shall be considered upon a gaming licensee's application for renewal of the gaming license.

(c) The commission shall conduct a public hearing on the application pursuant to section 11 1/2 of chapter 30A. An applicant for a gaming license and a municipality designated as a host or surrounding community shall be given at least 30 days notice of the public hearing. The commission shall hold the public hearing within the host community; provided, however, that the host community may request that the commission hold the hearing in another city or town.

(d) The public hearing shall provide the commission with the opportunity to address questions and concerns relative to the proposal of a gaming applicant to build a gaming establishment, including the scope and quality of the gaming area and amenities, the integration of the gaming establishment into the surrounding community and the extent of required mitigation plans and receive input from members of the public from an impacted community. During the hearing, the commission may take the opportunity to read into the record any letters of support, opposition or concern from members of a community in the vicinity of the proposed gaming establishment.

(e) Not sooner than 30 days nor later than 90 days after the conclusion of the public hearing, the commission shall take action on the application. The commission may: (i) grant the application for a gaming license; (ii) deny the application; or (iii) extend the period for issuing a

decision in order to obtain any additional information necessary for a complete evaluation of the application; provided, however, that the extension shall be not longer than 30 days.

(f) Upon denial of an application, the commission shall prepare and file the commission's decision and, if requested by the applicant, shall further prepare and file a statement of the reasons for the denial, including specific findings of fact by the commission and the recommendation from the bureau relative to the suitability of the applicant pursuant to sections 12 and 16. Applicants may request a hearing before the commission to contest any findings of fact by the bureau relative to the suitability of the applicant.

(g) The commission shall have full discretion as to whether to issue a license. Applicants shall have no legal right or privilege to a gaming license and shall not be entitled to any further review if denied by the commission.

Mass. Gen. L. c. 23K, § 19

(a) The commission may issue not more than 3 category 1 licenses based on the applications and bids submitted to the commission. Not more than 1 license shall be awarded per region. Regions shall be established as follows:

(1) region A: suffolk, middlesex, essex, norfolk and worcester counties;

(2) region B: hampshire, hampden, franklin and berkshire counties; and

(3) region C: bristol, plymouth, nantucket, dukes and barnstable counties.

Gaming licenses shall only be issued to applicants who are qualified under the criteria set forth in this chapter, as determined by the commission. Within any region, if the commission is not convinced that there is an applicant that has both met the eligibility criteria and provided convincing evidence that the applicant will provide value to

the region in which the gaming establishment is proposed to be located and to the commonwealth, no gaming license shall be awarded in that region.

(b) A category 1 license issued by the commission in any region shall be valid for an initial period of 15 years; provided, however, that no other gaming license shall be issued by the commission in any region during that 15-year period. The commission shall establish procedures for the renewal of a category 1 license, including a renewal fee, and submit to the clerks of the senate and house of representatives any legislative recommendations that may be necessary to implement those procedures, not less than 180 days before the expiration of the first license granted pursuant to this chapter.

(c) No gaming licensee shall transfer a gaming license or any direct or indirect interest in the gaming license or a gaming establishment without the majority approval of the commission. A person seeking to acquire a gaming license through a transfer shall qualify for licensure under this chapter. The commission shall reject a gaming license transfer or a transfer of interest in the gaming establishment to an unsuitable person and may reject a proposed transfer that, in the opinion of the commission, would be disadvantageous to the interests of the commonwealth.

(d) The commission shall take into consideration the physical distance in selecting the locations of the gaming establishments as they relate to each other and how they maximize benefits to the commonwealth; provided, however, that in determining which gaming applicant shall receive a gaming license in each region, the commission shall also consider the support or opposition to each gaming applicant from the public in the host and surrounding communities as demonstrated by public comment provided by the gaming applicant or directly to the commission pursuant to section 15 and through oral and written testimony received during the public hearing conducted pursuant to section 17.

(e) If a category 1 license is awarded to an applicant with a live racing license under chapter 128A as of July 1, 2011, a condition of the gaming license shall be to maintain and complete the annual live racing season

under said chapter 128A. Upon failure to conduct live racing, the commission shall suspend the category 1 license.

(f) If a category 1 license is awarded to an applicant with a simulcasting license under chapter 128C as of July 1, 2011, a condition of the gaming license shall be to maintain the simulcasting license under said chapter 128C. Upon failure to conduct simulcast wagering, the commission shall suspend the category 1 license.

(g) For the purposes of subsections (e) and (f), an applicant for a gaming license shall be considered to be the holder of a license under chapter 128A or chapter 128C if the applicant: (i) owns 50.1 or more per cent of the common stock of the company which obtained a license under said chapter 128A or 128C; and (ii) is a person who owns more than 5 per cent of the common stock of the applicant company, directly or indirectly, or is an institutional investor in the gaming license.

Mass. Gen. L. c. 23K, § 20

(a) The commission may issue not more than 1 category 2 license; provided, however, that the category 2 license shall only be issued to an applicant who is qualified under the criteria set forth in this chapter as determined by the commission. If the commission is not convinced that there is an applicant that has both met the eligibility criteria and provided convincing evidence that the applicant will provide value to the commonwealth, no category 2 license shall be awarded.

(b) If a category 2 license is awarded to an applicant with a simulcasting license under chapter 128C as of July 1, 2011, a condition of the gaming license shall be to maintain the simulcasting license pursuant to said chapter 128C. Upon failure to conduct simulcast wagering the commission shall suspend the category 2 license.

(c) If a category 2 license is awarded to an applicant with a live racing license pursuant to chapter 128A as of July 1, 2011 a condition of the gaming license shall be to maintain and complete the annual live racing season pursuant to said chapter 128A. Upon failure to conduct live racing, the commission shall suspend the category 2 license.

(d) For the purposes of subsections (b) and (c), an applicant for a gaming license shall be considered to be the holder of a license under chapter 128A or chapter 128C if the applicant: (i) owns 50.1 or more per cent of the common stock of the company which obtained a license under chapter 128A or 128C; and (ii) includes a person who owns more than 5 per cent of the common stock of the applicant company, directly or indirectly, or is an institutional investor in the gaming license.

(e) A category 2 license issued pursuant to this chapter shall not be transferrable or assignable without the approval of the commission; provided, however, that for 5 years after the initial issuance of a category 2 license, the commission shall only approve such a transfer if: (i) the licensee experiences a change in ownership; or (ii) the licensee fails to maintain suitability or other circumstances which the commission may consider, which, in the opinion of a majority of members of the commission, impacts a licensee's ability to successfully operate a gaming establishment.

(f) A category 2 license issued pursuant to this chapter shall be for a period of 5 years. The commission shall establish procedures for renewal and set the renewal fee based on the cost of fees associated with the evaluation of a licensee; provided, however, that the cost of renewal shall not be less than $100,000. Any renewal fees shall be deposited into the Gaming Revenue Fund.

Mass. Gen. L. c. 271, § 3
(as amended by Mass. St. 2011, c. 194, § 53)

Except as permitted under chapter 23K, every innholder, common victualler or person keeping or suffering to be kept in any place occupied by him implements such as are used in gaming, in order that the same may for hire, gain or reward be used for amusement, who suffers implements of such kind to be used upon any part of such premises for gaming for money or other property, or who suffers a person to play at an unlawful game or sport therein, shall for the first offence forfeit not more than one hundred dollars or be imprisoned for not more than three months; and for a subsequent offence shall be imprisoned for not more than one year. In either case he shall further recognize with sufficient sureties in a reasonable sum for his good

behavior, and especially that he will not be guilty of any offence against any of the provisions of sections one to six, inclusive, for three years from the date of the recognizance.

Mass. Gen. L. c. 271, § 5
(as amended by Mass. St. 2011, c. 194, § 54)

Whoever, **except as permitted under chapter 23K,** keeps or assists in keeping a common gaming house, or building or place occupied, used or kept for the purposes described in section twenty-three, or is found playing or present as provided in said section, or commonly keeps or suffers to be kept, in a building or place actually used and occupied by him, tables or other apparatus for the purpose of playing at an unlawful game or sport for money or any other valuable thing, shall be punished by a fine of not more than fifty dollars or by imprisonment for not more than three months.

Mass. Gen. L. c. 271, § 7
(as amended by Mass. St. 2011, c. 194, § 57)

Whoever sets up or promotes a lottery for money or other property of value, or by way of lottery disposes of any property of value, or under the pretext of a sale, gift or delivery of other property or of any right, privilege or thing whatever disposes of or offers or attempts to dispose of any property, with intent to make the disposal thereof dependent upon or connected with chance by lot, dice, numbers, game, hazard or other gambling device **that is not taking place in a gaming establishment licensed pursuant to chapter 23K**, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids either by printing or writing, or is in any way concerned, in the setting up, managing or drawing of such lottery, or in such disposal or offer or attempt to dispose of property by such chance or device, shall be punished by a fine of not more than three thousand dollars or by imprisonment in the state prison for not more than three years, or in jail or the house of correction for not more than two and one half years.

Mass. Gen. L. c. 271, § 8
(as amended by Mass. St. 2011, c. 194, § 58)

Whoever owns, occupies or is in control of a house, shop or building and knowingly permits the establishing, managing or drawing of a lottery, or the disposal or attempt to dispose of property, or the sale of a lottery ticket or share of a ticket, or any other writing, certificate, bill, token or other device purporting or intended to entitle the holder, bearer or any other person to a prize or to a share of or an interest in a prize to be drawn in a lottery, or in the disposal of property, and whoever knowingly allows money or other property to be raffled for or won by throwing or using dice or by any other game of chance **that is not being conducted in a gaming establishment licensed under chapter 23K**, shall be punished by a fine of not more than $2,000 or by imprisonment in the house of correction for not more than 1 year.

Mass. Const., Declaration of Rights, art. 1
(as appearing in amd. art. 106)

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

25 U.S.C. § 1771d

(a) PURCHASE OF PRIVATE SETTLEMENT LANDS. — The Secretary is authorized and directed to expend, at the request of the Wampanoag Tribal Council of Gay Head, Inc., $2,125,000 to acquire the private settlement lands. At the request of the Wampanoag Tribal Council of Gay Head, Inc., the Secretary shall not purchase lots 705, 222, and 528 of the private settlement lands, but, at the request of the Wampanoag Tribal Council of Gay Head, Inc., the Secretary shall acquire in lieu thereof such other lands that are contiguous to the remaining private settlement lands. Upon the purchase of such

contiguous lands, those lands shall be subject to the same restrictions and benefits as the private settlement lands.

(b) PAYMENT FOR SURVEY AND APPRAISAL. — The Secretary is authorized and directed to cause a survey of the public settlement lands to be made within 60 days of acquiring title to the public settlement lands. The Secretary shall reimburse the Native American Rights Fund and the Gay Head Taxpayers Association for an appraisal of the private settlement lands done by Paul O'Leary dated May 1, 1987. Such funds as may be necessary may be withdrawn from the Fund established in section 1771a(a) of this title and may be used for the purpose of conducting the survey and providing reimbursement for the appraisal.

(c) ACQUISITION OF ADDITIONAL LANDS. — The Secretary shall expend, at the request of the Wampanoag Tribal Council of Gay Head, Inc., any remaining funds not required by subsection (a) or (b) of this section to acquire any additional lands that are contiguous to the private settlement lands. Any lands acquired pursuant to this section, and any other lands which are on and after August 12, 1987, held in trust for the Wampanoag Tribal Council of Gay Head, Inc., any successor, or individual member, shall be subject to this subchapter, the Settlement Agreement and other applicable laws. Any after acquired land held in trust for the Wampanoag Tribal Council of Gay Head, Inc., any successor, or individual member, shall be subject to the same benefits and restrictions as apply to the most analogous land use described in the Settlement Agreement.

(d) TRANSFER AND SURVEY OF LAND TO WAMPANOAG TRIBAL COUNCIL. — Any right, title, or interest to lands acquired by the Secretary under this section, and the title to public settlement lands conveyed by the town of Gay Head, shall be held in trust for the Wampanoag Tribal Council of Gay Head, Inc. and shall be subject to this subchapter, the Settlement Agreement, and other applicable laws.

(e) PROCEEDINGS AUTHORIZED TO ACQUIRE OR TO PERFECT TITLE. — The Secretary is authorized to commence such condemnation proceedings as the Secretary may determine to be necessary--

(1) to acquire or perfect any right, title, or interest in any private settlement land, and

(2) to condemn any interest adverse to any ostensible owner of such land.

(f) PUBLIC SETTLEMENT LANDS HELD IN TRUST. — The Secretary is authorized to accept and hold in trust for the benefit of the Wampanoag Tribal Council of Gay Head, Inc. the public settlement lands as described in section 1771f(7) of this title immediately upon the effective date of this Act.

(g) APPLICATION. — The terms of this section shall apply to land in the town of Gay Head. Any land acquired by the Wampanoag Tribal Council of Gay Head, Inc., that is located outside the town of Gay Head shall be subject to all the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts.

(h) SPENDING AUTHORITY. — Any spending authority (as defined in section 651(c)(2) of Title 2) provided in this section shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

25 U.S.C. § 1771e

(a) LIMITATION ON INDIAN JURISDICTION OVER SETTLEMENT LANDS. — The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this subchapter, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws.

(b) SUBSEQUENT HOLDER BOUND TO SAME TERMS AND CONDITIONS. — Any tribe or tribal organization which acquires any settlement land or any other land that may now or in the future be owned by or held in trust for any Indian entity in the town of Gay Head, Massachusetts, from the Wampanoag Tribal Council of Gay Head, Inc. shall hold such beneficial interest to such land subject to the same terms and conditions as are applicable to such lands when held by such council.

(c) RESERVATIONS OF RIGHT AND AUTHORITY RELATING TO SETTLEMENT LANDS. — No provision of this subchapter shall affect or otherwise impair--

(1) any authority to impose a lien or temporary seizure on the settlement lands as provided in the State Implementing Act;

(2) the authority of the Secretary to approve leases in accordance with sections 415 to 415d of this title; or

(3) the legal capacity of the Wampanoag Tribal Council of Gay Head, Inc. to transfer the settlement lands to any tribal entity which may be organized as a successor in interest to Wampanoag Tribal Council of Gay Head, Inc. or to transfer--

(A) the right to use the settlement lands to its members,

(B) any easement for public or private purposes in accordance with the laws of the Commonwealth of Massachusetts or the ordinances of the town of Gay Head, Massachusetts, or

(C) title to the West Basin Strip to the town of Gay Head, Massachusetts, pursuant to the terms of the Settlement Agreement.

(d) EXEMPTION FROM STATE ASSESSMENT. — Any land held in trust by the Secretary for the benefit of the Wampanoag Tribal Council of Gay Head, Inc. shall be exempt from taxation or lien or "in lieu of payment" or other assessment by the State or any political subdivision of the State to the extent provided by the Settlement Agreement: Provided, however, That such taxation or lien or "in lieu of payment" or other assessment will only apply to lands which are zoned and utilized as commercial: Provided further, That this section shall not be interpreted as restricting the Tribe from entering into an agreement with the town of Gay Head to reimburse such town for the delivery of specific public services on the tribal lands.

25 U.S.C. § 1771f

For the purposes of this subchapter:

(1) COOK LANDS. — The term "Cook lands" means the lands described in paragraph (5) of the Settlement Agreement.

(2) WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC. — The term "Wampanoag Tribal Council of Gay Head, Inc." means the tribal entity recognized by the Secretary of the Interior as having a government to government relationship with the United States. The Wampanoag Tribal Council of Gay Head, Inc. is the sole and legitimate tribal entity which has a claim under the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137), to land within the town of Gay Head. The membership of the Wampanoag Tribal Council of Gay Head, Inc., includes those 521 individuals who have been recognized by the Secretary of the Interior as being members of the Wampanoag Tribal Council of Gay Head, Inc., and such Indians of Gay Head ancestry as may be added from time to time by the governing body of the Wampanoag Tribal Council of Gay Head, Inc.: Provided, That nothing in this section shall prevent the voluntary withdrawal from membership in the Wampanoag Tribal Council of Gay Head, Inc., pursuant to procedures established by the Tribe. The governing body of the Wampanoag Tribal Council of Gay Head, Inc. is hereby authorized to act on behalf of and bind the Wampanoag Tribal Council of Gay Head, Inc., in all matters related to carrying out this subchapter.

(3) FUND. — The term "fund" means the Wampanoag Tribal Council of Gay Head, Inc. Claims Settlement Fund established under section 1771a of this title.

(4) LAND OR NATURAL RESOURCES. — The term "land or natural resources" means any real property or natural resources or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish.

(5) LAWSUIT. — The term "lawsuit" means the action entitled Wampanoag Tribal Council of Gay Head, and others versus Town of Gay Head, and others (C.A. No. 74-5826-McN (D.Mass.)).

(6) PRIVATE SETTLEMENT LANDS. — The term "private settlement lands" means approximately 177 acres of privately held land described in paragraph 6 of the Settlement Agreement.

(7) PUBLIC SETTLEMENT LANDS. — The term "public settlement lands" means the lands described in paragraph (4) of the Settlement Agreement.

(8) SETTLEMENT LANDS. — The term "settlement lands" means the private settlement lands and the public settlement lands.

(9) SECRETARY. — The term "Secretary" means the Secretary of the Interior.

(10) SETTLEMENT AGREEMENT. — The term "Settlement Agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts, Indian Land Claims," executed as of November 22, 1983, and renewed thereafter by representatives of the parties to the lawsuit, and as filed with the Secretary of the Commonwealth of Massachusetts.

(11) STATE IMPLEMENTING ACT. — The term "State implementing act" means legislation enacted by the Commonwealth of Massachusetts conforming to the requirements of this subchapter and the requirements of the Massachusetts Constitution.

(12) TRANSFER. — The term "transfer" includes--

(A) any sale, grant, lease, allotment, partition, or conveyance,

(B) any transaction the purpose of which is to effect a sale, grant, lease, allotment, partition, or conveyance, or

(C) any event or events that resulted in a change of possession or control of land or natural resources.

(13) WEST BASIN STRIP. — The term "West Basin Strip" means a strip of land along the West Basin which the Wampanoag Tribal Council is authorized to convey, under paragraph (11) of the Settlement Agreement, to the town of Gay Head.

25 U.S.C. § 1771g

Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe

or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

25 U.S.C. § 2702

The purpose of this chapter is--

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2710(d)

(d) CLASS III GAMING ACTIVITIES; AUTHORIZATION; REVOCATION; TRIBAL-STATE COMPACT

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly

related to, and necessary for, the licensing and regulation of such activity;
(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
(v) remedies for breach of contract;
(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--
(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and
(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [FN2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

25 U.S.C. § 2719

(a) PROHIBITION ON LANDS ACQUIRED IN TRUST BY SECRETARY. — Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless--

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and--

(A) such lands are located in Oklahoma and--

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) EXCEPTIONS. —

(1) Subsection (a) of this section will not apply when--

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of--

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to--

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that

such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) AUTHORITY OF SECRETARY NOT AFFECTED. — Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) APPLICATION OF TITLE 26. —

(1) The provisions of Title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.